

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DANNY C. MUTZIGER, II

Decedent

VS.

HOMIER DISTRIBUTING COMPANY

Respondent

AND

WAUSAU UNDERWRITERS INSURANCE COMPANY

Insurance Carrier

Docket No. 1,018,165

ORDER

Respondent and its insurance carrier appealed the April 21, 2008, Award entered by Administrative Law Judge Pamela J. Fuller. The Workers Compensation Board heard oral argument on July 23, 2008, in Topeka, Kansas.

APPEARANCES

Jeffery A. Mason of Goodland, Kansas, appeared for Brandy Mutziger, who claims to be the decedent's surviving spouse. Ronald J. Laskowski of Topeka, Kansas, appeared for Betty Cantrell, who is the guardian of the minor, D. B. Christopher J. McCurdy of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, at oral argument before the Board the parties stipulated the burial allowance should be paid to the funeral home that provided the funeral services rather than to the decedent's father.

ISSUES

This is a claim for death benefits arising out of the decedent's February 7, 2004, work-related accident and resulting death. In the April 21, 2008, Award, Judge Fuller granted the following:

1. Compensation to Betty Cantrell as the guardian of the decedent's minor son, D. B.
2. Burial allowance of \$5,000 to the decedent's father, Danny Mutziger.
3. Interest to D. B. at the rate of 10 percent "assessed against the respondent from and after August 25, 2005 until paid, for failure to pay ½ of the death benefits to [D. B.]."¹

Respondent contends Judge Fuller erred and raises the following issues on appeal: (1) whether D. B. established he is the decedent's child; (2) whether the Judge erred by denying respondent's requests to require D. B. to produce medical records and to undergo DNA testing; (3) whether the Judge erred in assessing interest against respondent under K.S.A. 44-512b for failing to pay compensation to D. B.; and (4) whether the Judge erred by issuing an award while respondent was attempting to extend its terminal date by forwarding a proposed order to Mr. Laskowski. Accordingly, respondent requests the Board to (1) remand this claim to Judge Fuller to accept and consider respondent's evidence and (2) enter an order requiring D. B. to undergo DNA or paternity testing to determine conclusively whether he is the decedent's child.

D. B., by and through his guardian, requests the Board to affirm the Award. D. B.'s guardian contends: (1) the Judge correctly determined D. B. has established that he was a wholly dependent child of the decedent as that phrase is defined by the Workers Compensation Act; (2) the Judge correctly determined D. B. was entitled to interest as respondent did not have just cause to withhold the payment of benefits; (3) the Judge correctly determined there was an abandonment of the marital relationship between the decedent and Brandy Mutziger, thereby extinguishing her right to receive workers compensation benefits as the surviving spouse; and (4) the Judge did not err in issuing an award without considering respondent's proposed evidence as respondent failed to request the Judge to extend its terminal date until after the Award was entered.

Brandy Mutziger contends she is entitled to compensation as the decedent's surviving spouse. Ms. Mutziger argues there was no abandonment of her marriage with the decedent as that language is contemplated in K.S.A. 44-508(c)(2). In addition, Ms. Mutziger contends the interest assessed against respondent was appropriate and that respondent did not exercise good faith in attempting to extend its terminal date as her counsel was never contacted about any extension.

The issues before the Board on this appeal are:

¹ ALJ Award (Apr. 21, 2008) at 7.

1. Is D. B. a wholly dependent child of decedent under the Workers Compensation Act and, therefore, entitled to receive compensation due to decedent's demise?
2. Should D. B. be required to produce medical records and to undergo DNA testing for purposes of proving or disproving his paternity?
3. Is Brandy Mutziger entitled to receive death benefits as the decedent's surviving spouse or, instead, was there an abandonment of the marriage?
4. Should interest be assessed against respondent under K.S.A. 44-512b for its failure to pay compensation to D. B. before the Award was entered?
5. Did the Judge err by issuing an award while respondent was attempting to obtain Mr. Laskowski's signature on a proposed order extending respondent's terminal date although respondent neither contacted Ms. Mutziger's attorney nor the Judge about such an extension?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

The parties stipulated the decedent died on February 7, 2004, as the result of an accident at work. The parties also stipulated that accident arose out of and in the course of decedent's employment with respondent.

1. Is D. B. a wholly dependent child of decedent under the Workers Compensation Act and, therefore, entitled to receive death benefits?

The Workers Compensation Act provides that compensation is payable to a "surviving legal spouse" or a "wholly dependent child" when death results from an injury that is compensable under the Act.²

Where death results from injury, compensation shall be paid as provided in K.S.A. 44-510h and 44-510i and amendments thereto, and as follows:

(a) If an employee leaves any dependents wholly dependent upon the employee's earnings at the time of the accident, all compensation benefits under this section

² See K.S.A. 2003 Supp. 44-510b.

shall be paid to such dependent persons. There shall be an initial payment of \$40,000 to the surviving legal spouse or a wholly dependent child or children or both. . . . The initial payment shall be immediately due and payable and apportioned 50% to the surviving legal spouse and 50% to the dependent children. Thereafter, such dependents shall be paid weekly compensation . . . subject to the following:

(1) If the employee leaves a surviving legal spouse or a wholly dependent child or children, or both, who are eligible for benefits under this section, then all death benefits shall be paid to such surviving spouse or children, or both, and no benefits shall be paid to any other wholly or partially dependent persons.³

And K.S.A. 2003 Supp. 44-508(c) defines the term “wholly dependent child,” as follows:

(3) “Wholly dependent child or children” means:

(A) A birth child or adopted child of the employee except such a child whose relationship to the employee has been severed by adoption;

(B) a stepchild of the employee who lives in the employee’s household;

(C) any other child who is actually dependent in whole or in part on the employee and who is related to the employee by marriage or consanguinity; or

(D) any child as defined in subsections (3)(A), (3)(B) or (3)(C) who is less than 23 years of age and who is not physically or mentally capable of earning wages in any type of substantial and gainful employment or who is a full-time student attending an accredited institution of higher education or vocational education.

One of the principal issues in this claim is whether the evidence proves that D. B. was a wholly dependent child of decedent and, therefore, entitled to receive compensation as a result of the decedent’s death.

D. B. was born on March 3, 1997, and is now 11 years old. At the time of D. B.’s conception and birth his mother, Shannon Thompson, was not married to the decedent but, instead, married to another man, Steve Bowman. The initial birth certificate stated that Mr. Bowman, rather than the decedent, was D. B.’s father.

Nonetheless, Ms. Thompson contends she was separated from Mr. Bowman and living with the decedent at the time of D. B.’s conception. She is certain decedent is D. B.’s biological father. Ms. Thompson testified Mr. Bowman was designated the father on the birth certificate as hospital personnel told her she had to name him as the father because the birth occurred within six months of her filing for a divorce. According to Ms. Thompson

³ K.S.A. 2003 Supp. 44-510b.

the divorce papers do not refer to D. B. in any manner and the child support provisions pertain only to Ms. Thompson's other child.

D. B.'s guardian, Betty Cantrell, is also his grandmother. She testified the decedent acknowledged he was D. B.'s father. Moreover, she received life insurance benefits and also began receiving Social Security benefits for D. B. by reason of decedent's death.

But most importantly, the decedent officially acknowledged paternity in a proceeding initiated in the State of Oklahoma. A document entitled Agreed Paternity Order and Support Obligation was filed August 1, 2001, in the Oklahoma Department of Human Services, Office of Administrative Hearings, in Carter County, Oklahoma. That administrative order was then filed on September 4, 2001, with the Clerk of the District Court, Carter County, Oklahoma.

The Board finds the determination of D. B.'s paternity in Oklahoma is determinative and may not be challenged by respondent in this proceeding. As stated in *R.L.J. v. Western Sprinklers, Inc.*,⁴

[p]arentage may be initially determined in a workers compensation case only if there has not been a previous determination on the issue of parentage.⁵

In addition, Kansas gives full faith and credit to determinations of paternity made in other states. K.S.A. 38-1114(d) reads:

Full faith and credit *shall* be given to a determination of paternity made by any other state or jurisdiction, whether the determination is established by judicial or administrative process or by voluntary acknowledgment. As used in this section, "full faith and credit" means that the determination of paternity shall have the same conclusive effect and obligatory force in this state as it has in the state or jurisdiction where made. (Emphasis added.)

In conclusion, it has been determined by the State of Oklahoma that D. B. is decedent's child. And that determination is binding upon the Board. Accordingly, D. B. is a birth child of decedent and, thus, a "wholly dependent child" under K.S.A. 2003 Supp. 44-508(c)(3), quoted above.

⁴ *R.L.J. v. Western Sprinklers, Inc.*, 17 Kan. App. 2d 749, 844 P.2d 37 (1992), rev. denied 252 Kan. 1093 (1993).

⁵ *Id.* at Syl. ¶ 3.

2. Should D. B. be required to produce medical records and to undergo DNA testing for purposes of proving or disproving his paternity?

The above holding that Oklahoma has determined D. B.'s paternity and such determination is binding upon the Board renders moot the issue of whether D. B. should be required to produce medical records and undergo DNA testing.

3. Is Brandy Mutziger entitled to receive death benefits as the decedent's surviving spouse or, instead, was there an abandonment of the marriage?

Where death results from an injury, the Workers Compensation Act provides that a surviving legal spouse shall be immediately paid \$40,000 in compensation and shall be paid compensation for life, subject to a \$250,000 cap.⁶

The statute governing death benefits, K.S.A. 2003 Supp. 44-510b, does not define the phrase "surviving legal spouse." But another statute, K.S.A. 2003 Supp. 44-508, defines the phrase "members of a family" which addresses the phrase "surviving legal spouse." That statute provides, in part:

(c)(1) "Dependents" means such members of the employee's family as were wholly or in part dependent upon the employee at the time of the accident.

(2) "Members of a family" means only surviving legal spouse and children In the meaning of this section, a surviving spouse shall not be regarded as a dependent of a deceased employee or as a member of the family, if the surviving spouse shall have for more than six months willfully or voluntarily deserted or abandoned the employee prior to the date of the employee's death.⁷

And the appellate courts have held that a surviving spouse is not entitled to receive compensation under K.S.A. 44-510b when the spouse abandoned the deceased employee or when there has been a mutual abandonment of the marriage. In *Redditt*,⁸ the Kansas Court of Appeals held:

The plain language of K.S.A. 1999 Supp. 44-508(c)(2) suggests that the Kansas Legislature did not mean to preclude application of the doctrine of mutual abandonment. The statute merely states that a surviving spouse is not eligible for

⁶ K.S.A. 2003 Supp. 44-510b(a) and (a)(2).

⁷ K.S.A. 2003 Supp. 44-508.

⁸ *Redditt v. McDonald's Restaurant*, 28 Kan. App. 2d 802, 805, 20 P.3d 1286, rev. denied 271 Kan. 1037 (2001).

death benefits if he or she abandoned the employee spouse for more than 6 months prior to the employee's death. Under the plain language of the statute, a surviving spouse could later abandon the marriage even after he or she had previously been abandoned by the employee. It is a fundamental rule of statutory construction that the intent of the legislature governs if that intent can be ascertained. (Citation omitted.)

The concept of mutual abandonment fits squarely within K.S.A. 1999 Supp. 44-508(c)(2). We see nothing in the plain language of the statute which would convince us that the legislature did not envision a situation where both spouses abandoned their marriage. However, the facts of the instant case will determine whether mutual abandonment took place.

The record indicates decedent married Brandy Laster/Mutziger in late 1994. But approximately 2½ months later the decedent left Ms. Mutziger. Suffice it to say, claimant entered prison in 1996 and after his release rejoined Ms. Mutziger for approximately 8½ months. Decedent then left Ms. Mutziger again. She last saw him sometime in 1999 or 2000 for a couple of days. She last spoke to decedent in July 2003, and in January 2004 she initiated divorce proceedings.

After leaving Ms. Mutziger on the first occasion, decedent began his relationship with Shannon Thompson. When decedent spoke with Ms. Thompson's mother, Betty Cantrell, in either May or June 1996 he told Ms. Cantrell he was divorced from someone named Brandy.

As indicated above, the decedent reunited with Ms. Mutziger for several months after his release from prison. But he left Ms. Mutziger again and eventually began living with another woman, Willie Diane Mutziger. When Ms. Willie Mutziger died in October 2001, the decedent was listed as her common law husband in the funeral announcement.

The Board concludes both decedent and Brandy Mutziger abandoned their marriage. The evidence establishes that both the decedent and Brandy Mutziger began relationships with others. The evidence also establishes the decedent and Brandy Mutziger last saw each other in 1999 or 2000 and last spoke to each other in July 2003. In short, the evidence establishes a mutual abandonment of the marriage. Consequently, Brandy Mutziger is not entitled to receive compensation as the decedent's surviving legal spouse.

4. Should interest be assessed against respondent under K.S.A. 44-512b for its failure to pay compensation to D. B. before the Award was entered?

The Workers Compensation Act was designed to be self-enacting. Or, stated in another way, the legislature intended that employers and insurance carriers would

voluntarily pay compensation to injured workers without first being ordered. Accordingly, the Act provides that injured workers shall be entitled to interest when an employer or insurance carrier did not have a legitimate reason for failing to pay compensation before an award. The Act provides:

Whenever the administrative law judge or board finds, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto. Such interest shall be assessed against the employer or insurance carrier liable for the compensation and shall accrue from the date such compensation was due.⁹

After finding several demands had been made upon respondent for compensation to be paid D. B., the Judge determined D. B. was entitled to receive interest commencing August 25, 2005, on a portion of the compensation ultimately determined due and owing D. B.

The Board affirms the assessment of interest against respondent under K.S.A. 44-512b but modifies the commencement date to June 1, 2004, and the amount. On June 1, 2004, an attorney representing Betty Cantrell forwarded respondent copies of the Order for Guardian in which Ms. Cantrell was appointed D. B.'s guardian and a copy of the documents in the Oklahoma paternity proceeding in which the decedent was determined to be D. B.'s father. That letter was followed by another dated July 12, 2004, to respondent's attorney. And those letters were followed by others dated February 25, 2005; April 7, 2005; May 31, 2005; August 25, 2005; and March 16, 2006.

In particular, the April 7, 2005, letter from Mr. Laskowski to respondent's attorney requested payment of funeral expenses and the commencement of death benefits to D. B. despite the claim of an alleged surviving spouse. Similarly, Mr. Laskowski's August 25, 2005, letter to respondent's attorney again requested death benefits be paid to D. B. regardless of Brandy Laster's [Mutziger] claim as surviving spouse.

Despite Brandy Mutziger's claim as surviving spouse, respondent did not have just cause or excuse to withhold the payment of compensation to D. B. The Board, however, finds that interest should commence June 1, 2004, the approximate date respondent was first provided copies of the Order for Guardian and documents in the Oklahoma paternity

⁹ K.S.A. 44-512b(a).

proceeding as the respondent was aware as of that time that D. B. was entitled under K.S.A. 2003 Supp. 44-510b to receive at least half of the compensation payable by reason of the decedent's death. Accordingly, respondent is assessed interest under K.S.A. 44-512b.

K.S.A. 44-512b provides that interest shall be determined under K.S.A. 16-204(e)(1). And that statute provides:

Except as otherwise provided in this subsection, on and after July 1, 1996, the rate of interest on judgments rendered by courts of this state pursuant to the code of civil procedure shall be at a rate per annum: (A) **Which shall change effective July 1 of each year for both judgments rendered prior to such July 1 and judgments rendered during the twelve-month period beginning such July 1**; and (B) which is equal to an amount that is four percentage points above the discount rate (the charge on loans to depository institutions by the New York federal reserve bank as reported in the money rates column of the Wall Street Journal) as of July 1 preceding the date the judgment was rendered. The secretary of state shall publish notice of the interest rate provided by this subsection (e) (1) not later than the second issue of the Kansas register published in July of each year. (Emphasis added.)

And the Kansas secretary of state has determined the following interest rates are applicable for the following periods:

6 percent during the period of July 1, 2003, through June 30, 2004;¹⁰
6.25 percent during the period of July 1, 2004, through June 30, 2005;¹¹
8.25 percent during the period of July 1, 2005, through June 30, 2006;¹²
10.25 percent during the period of July 1, 2006, through June 30, 2007;¹³
10.25 percent during the period of July 1, 2007, through June 30, 2008;¹⁴
6.25 percent during the period of July 1, 2008, through June 30, 2009.¹⁵

¹⁰ *Kansas Register*, Vol. 22, No. 28, July 10, 2003, p. 1207.

¹¹ *Kansas Register*, Vol. 23, No. 28, July 8, 2004, p. 1040.

¹² *Kansas Register*, Vol. 24, No. 27, July 7, 2005, p. 1104.

¹³ *Kansas Register*, Vol. 25, No. 27, July 6, 2006, p. 913.

¹⁴ *Kansas Register*, Vol. 26, No. 28, July 12, 2007, p. 1130.

¹⁵ *Kansas Register*, Vol. 27, No. 28, July 10, 2008, p. 1052.

Respondent is assessed interest, as follows:

<u>Period</u>	<u>Compensation Amount</u> ¹⁶	<u>Interest Rate</u>	<u>Per Diem Rate</u>	<u>Interest</u>
06/01/04 – 06/04/04	\$23,479.68 ¹⁷	6%	\$3.86	\$15.44
06/05/04 – 06/11/04	\$23,697.16	6%	\$3.90	\$27.30
06/12/04 – 06/18/04	\$23,914.64	6%	\$3.93	\$27.51
06/19/04 – 06/25/04	\$24,132.12	6%	\$3.97	\$27.79
06/26/04 – 06/30/04	\$24,349.60	6%	\$4.00	\$20.00
07/01/04 – 07/02/04	\$24,349.60	6.25%	\$4.17	\$8.34
07/03/04 – 07/09/04	\$24,567.08	6.25%	\$4.21	\$29.47
07/10/04 – 07/16/04	\$24,784.56	6.25%	\$4.24	\$29.68
07/17/04 – 07/23/04	\$25,002.04	6.25%	\$4.28	\$29.96
07/24/04 – 07/30/04	\$25,219.52	6.25%	\$4.32	\$30.24
07/31/04 – 08/06/04	\$25,437.00	6.25%	\$4.36	\$30.52
08/07/04 – 08/13/04	\$25,654.48	6.25%	\$4.39	\$30.73
08/14/04 – 08/20/04	\$25,871.96	6.25%	\$4.43	\$31.01
08/21/04 – 08/27/04	\$26,089.44	6.25%	\$4.47	\$31.29
08/28/04 – 09/03/04	\$26,306.92	6.25%	\$4.50	\$31.50
09/04/04 – 09/10/04	\$26,524.40	6.25%	\$4.54	\$31.78
09/11/04 – 09/17/04	\$26,741.88	6.25%	\$4.58	\$32.06
09/18/04 – 09/24/04	\$26,959.36	6.25%	\$4.62	\$32.34
09/25/04 – 10/01/04	\$27,176.84	6.25%	\$4.65	\$32.55
10/02/04 – 10/08/04	\$27,394.32	6.25%	\$4.69	\$32.83
10/09/04 – 10/15/04	\$27,611.80	6.25%	\$4.73	\$33.11
10/16/04 – 10/22/04	\$27,829.28	6.25%	\$4.77	\$33.39
10/23/04 – 10/29/04	\$28,046.76	6.25%	\$4.80	\$33.60
10/30/04 – 11/05/04	\$28,264.24	6.25%	\$4.84	\$33.88
11/06/04 – 11/12/04	\$28,481.72	6.25%	\$4.88	\$34.16
11/13/04 – 11/19/04	\$28,699.20	6.25%	\$4.91	\$34.37
11/20/04 – 11/26/04	\$28,916.68	6.25%	\$4.95	\$34.65
11/27/04 – 12/03/04	\$29,134.16	6.25%	\$4.99	\$34.93
12/04/04 – 12/10/04	\$29,351.64	6.25%	\$5.03	\$35.21
12/11/04 – 12/17/04	\$29,569.12	6.25%	\$5.06	\$35.42

¹⁶ This is the amount respondent should have paid D. B. regardless of the claim of Brandy Mutziger. It represents half of the \$40,000 initial payment that is to be paid upon a worker's death and half of the weekly compensation benefit (\$217.48) as it accrued.

¹⁷ This amount is derived by adding \$20,000, which is half of the \$40,000 initial payment, to \$3,479.68, which represents half of the weekly compensation benefit that had accrued through June 1, 2004.

DANNY C. MUTZIGER, II**DOCKET NO. 1,018,165**

12/18/04 – 12/24/04	\$29,786.60	6.25%	\$5.10	\$35.70
12/25/04 – 12/31/04	\$30,004.08	6.25%	\$5.14	\$35.98
01/01/05 – 01/07/05	\$30,221.56	6.25%	\$5.17	\$36.19
01/08/05 – 01/14/05	\$30,439.04	6.25%	\$5.21	\$36.47
01/15/05 – 01/21/05	\$30,656.52	6.25%	\$5.25	\$36.75
01/22/05 – 01/28/05	\$30,874.00	6.25%	\$5.29	\$37.03
01/29/05 – 02/04/05	\$31,091.48	6.25%	\$5.32	\$37.24
02/05/05 – 02/11/05	\$31,308.96	6.25%	\$5.36	\$37.52
02/12/05 – 02/18/05	\$31,526.44	6.25%	\$5.40	\$37.80
02/19/05 – 02/25/05	\$31,743.92	6.25%	\$5.44	\$38.08
02/26/05 – 03/04/05	\$31,961.40	6.25%	\$5.47	\$38.29
03/05/05 – 03/11/05	\$32,178.88	6.25%	\$5.51	\$38.57
03/12/05 – 03/18/05	\$32,396.36	6.25%	\$5.55	\$38.85
03/19/05 – 03/25/05	\$32,613.84	6.25%	\$5.58	\$39.06
03/26/05 – 04/01/05	\$32,831.32	6.25%	\$5.62	\$39.34
04/02/05 – 04/08/05	\$33,048.80	6.25%	\$5.66	\$39.62
04/09/05 – 04/15/05	\$33,266.28	6.25%	\$5.70	\$39.90
04/16/05 – 04/22/05	\$33,483.76	6.25%	\$5.73	\$40.11
04/23/05 – 04/29/05	\$33,701.24	6.25%	\$5.77	\$40.39
04/30/05 – 05/06/05	\$33,918.72	6.25%	\$5.81	\$40.67
05/07/05 – 05/13/05	\$34,136.20	6.25%	\$5.85	\$40.95
05/14/05 – 05/20/05	\$34,353.68	6.25%	\$5.88	\$41.16
05/21/05 – 05/27/05	\$34,571.16	6.25%	\$5.92	\$41.44
05/28/05 – 06/03/05	\$34,788.64	6.25%	\$5.96	\$41.72
06/04/05 – 06/10/05	\$35,006.12	6.25%	\$5.99	\$41.93
06/11/05 – 06/17/05	\$35,223.60	6.25%	\$6.03	\$42.21
06/18/05 – 06/24/05	\$35,441.08	6.25%	\$6.07	\$42.49
06/25/05 – 06/30/05	\$35,658.56	6.25%	\$6.11	\$36.66
07/01/05 – 07/01/05	\$35,658.56	8.25%	\$8.06	\$8.06
07/02/05 – 07/08/05	\$35,876.04	8.25%	\$8.11	\$56.77
07/09/05 – 07/15/05	\$36,093.52	8.25%	\$8.16	\$57.12
07/16/05 – 07/22/05	\$36,311.00	8.25%	\$8.21	\$57.47
07/23/05 – 07/29/05	\$36,528.48	8.25%	\$8.26	\$57.82
07/30/05 – 08/05/05	\$36,745.96	8.25%	\$8.31	\$58.17
08/06/05 – 08/12/05	\$36,963.44	8.25%	\$8.35	\$58.45
08/13/05 – 08/19/05	\$37,180.92	8.25%	\$8.40	\$58.80
08/20/05 – 08/26/05	\$37,398.40	8.25%	\$8.45	\$59.15
08/27/05 – 09/02/05	\$37,615.88	8.25%	\$8.50	\$59.50
09/03/05 – 09/09/05	\$37,833.36	8.25%	\$8.55	\$59.85
09/10/05 – 09/16/05	\$38,050.84	8.25%	\$8.60	\$60.20
09/17/05 – 09/23/05	\$38,268.32	8.25%	\$8.65	\$60.55
09/24/05 – 09/30/05	\$38,485.80	8.25%	\$8.70	\$60.90

DANNY C. MUTZIGER, II**DOCKET NO. 1,018,165**

10/01/05 – 10/07/05	\$38,703.28	8.25%	\$8.75	\$61.25
10/08/05 – 10/14/05	\$38,920.76	8.25%	\$8.80	\$61.60
10/15/05 – 10/21/05	\$39,138.24	8.25%	\$8.85	\$61.95
10/22/05 – 10/28/05	\$39,355.72	8.25%	\$8.90	\$62.30
10/29/05 – 11/04/05	\$39,573.20	8.25%	\$8.94	\$62.58
11/05/05 – 11/11/05	\$39,790.68	8.25%	\$8.99	\$62.93
11/12/05 – 11/18/05	\$40,008.16	8.25%	\$9.04	\$63.28
11/19/05 – 11/25/05	\$40,225.64	8.25%	\$9.09	\$63.63
11/26/05 – 12/02/05	\$40,443.12	8.25%	\$9.14	\$63.98
12/03/05 – 12/09/05	\$40,660.60	8.25%	\$9.19	\$64.33
12/10/05 – 12/16/05	\$40,878.08	8.25%	\$9.24	\$64.68
12/17/05 – 12/23/05	\$41,095.56	8.25%	\$9.29	\$65.03
12/24/05 – 12/30/05	\$41,313.04	8.25%	\$9.34	\$65.38
12/31/05 – 01/06/06	\$41,530.52	8.25%	\$9.39	\$65.73
01/07/06 – 01/13/06	\$41,748.00	8.25%	\$9.44	\$66.08
01/14/06 – 01/20/06	\$41,965.48	8.25%	\$9.49	\$66.43
01/21/06 – 01/27/06	\$42,182.96	8.25%	\$9.53	\$66.71
01/28/06 – 02/03/06	\$42,400.44	8.25%	\$9.58	\$67.06
02/04/06 – 02/10/06	\$42,617.92	8.25%	\$9.63	\$67.41
02/11/06 – 02/17/06	\$42,835.40	8.25%	\$9.68	\$67.76
02/18/06 – 02/24/06	\$43,052.88	8.25%	\$9.73	\$68.11
02/25/06 – 03/03/06	\$43,270.36	8.25%	\$9.78	\$68.46
03/04/06 – 03/10/06	\$43,487.84	8.25%	\$9.83	\$68.81
03/11/06 – 03/17/06	\$43,705.32	8.25%	\$9.88	\$69.16
03/18/06 – 03/24/06	\$43,922.80	8.25%	\$9.93	\$69.51
03/25/06 – 03/31/06	\$44,140.28	8.25%	\$9.98	\$69.86
04/01/06 – 04/07/06	\$44,357.76	8.25%	\$10.03	\$70.21
04/08/06 – 04/14/06	\$44,575.24	8.25%	\$10.08	\$70.56
04/15/06 – 04/21/06	\$44,792.72	8.25%	\$10.12	\$70.84
04/22/06 – 04/28/06	\$45,010.20	8.25%	\$10.17	\$71.19
04/29/06 – 05/05/06	\$45,227.68	8.25%	\$10.22	\$71.54
05/06/06 – 05/12/06	\$45,445.16	8.25%	\$10.27	\$71.89
05/13/06 – 05/19/06	\$45,662.64	8.25%	\$10.32	\$72.24
05/20/06 – 05/26/06	\$45,880.12	8.25%	\$10.37	\$72.59
05/27/06 – 06/02/06	\$46,097.60	8.25%	\$10.42	\$72.94
06/03/06 – 06/09/06	\$46,315.08	8.25%	\$10.47	\$73.29
06/10/06 – 06/16/06	\$46,532.56	8.25%	\$10.52	\$73.64
06/17/06 – 06/23/06	\$46,750.04	8.25%	\$10.57	\$73.99
06/24/06 – 06/30/06	\$46,967.52	8.25%	\$10.62	\$74.34
07/01/06 – 07/07/06	\$47,185.00	10.25%	\$13.25	\$92.75
07/08/06 – 07/14/06	\$47,402.48	10.25%	\$13.31	\$93.17
07/15/06 – 07/21/06	\$47,619.96	10.25%	\$13.37	\$93.59

DANNY C. MUTZIGER, II**DOCKET NO. 1,018,165**

07/22/06 – 07/28/06	\$47,837.44	10.25%	\$13.43	\$94.01
07/29/06 – 08/04/06	\$48,054.92	10.25%	\$13.49	\$94.43
08/05/06 – 08/11/06	\$48,272.40	10.25%	\$13.56	\$94.92
08/12/06 – 08/18/06	\$48,489.88	10.25%	\$13.62	\$95.34
08/19/06 – 08/25/06	\$48,707.36	10.25%	\$13.68	\$95.76
08/26/06 – 09/01/06	\$48,924.84	10.25%	\$13.74	\$96.18
09/02/06 – 09/08/06	\$49,142.32	10.25%	\$13.80	\$96.60
09/09/06 – 09/15/06	\$49,359.80	10.25%	\$13.86	\$97.02
09/16/06 – 09/22/06	\$49,577.28	10.25%	\$13.92	\$97.44
09/23/06 – 09/29/06	\$49,794.76	10.25%	\$13.98	\$97.86
09/30/06 – 10/06/06	\$50,012.24	10.25%	\$14.04	\$98.28
10/07/06 – 10/13/06	\$50,229.72	10.25%	\$14.11	\$98.77
10/14/06 – 10/20/06	\$50,447.20	10.25%	\$14.17	\$99.19
10/21/06 – 10/27/06	\$50,664.68	10.25%	\$14.23	\$99.61
10/28/06 – 11/03/06	\$50,882.16	10.25%	\$14.29	\$100.03
11/04/06 – 11/10/06	\$51,099.64	10.25%	\$14.35	\$100.45
11/11/06 – 11/17/06	\$51,317.12	10.25%	\$14.41	\$100.87
11/18/06 – 11/24/06	\$51,534.60	10.25%	\$14.47	\$101.29
11/25/06 – 12/01/06	\$51,752.08	10.25%	\$14.53	\$101.71
12/02/06 – 12/08/06	\$51,969.56	10.25%	\$14.59	\$102.13
12/09/06 – 12/15/06	\$52,187.04	10.25%	\$14.66	\$102.62
12/16/06 – 12/22/06	\$52,404.52	10.25%	\$14.72	\$103.04
12/23/06 – 12/29/06	\$52,622.00	10.25%	\$14.78	\$103.46
12/30/06 – 01/05/07	\$52,839.48	10.25%	\$14.84	\$103.88
01/06/07 – 01/12/07	\$53,056.96	10.25%	\$14.90	\$104.30
01/13/07 – 01/19/07	\$53,274.44	10.25%	\$14.96	\$104.72
01/20/07 – 01/26/07	\$53,491.92	10.25%	\$15.02	\$105.14
01/27/07 – 02/02/07	\$53,709.40	10.25%	\$15.08	\$105.56
02/03/07 – 02/09/07	\$53,926.88	10.25%	\$15.14	\$105.98
02/10/07 – 02/16/07	\$54,144.36	10.25%	\$15.20	\$106.40
02/17/07 – 02/23/07	\$54,361.84	10.25%	\$15.27	\$106.89
02/24/07 – 03/02/07	\$54,579.32	10.25%	\$15.33	\$107.31
03/03/07 – 03/09/07	\$54,796.80	10.25%	\$15.39	\$107.73
03/10/07 – 03/16/07	\$55,014.28	10.25%	\$15.45	\$108.15
03/17/07 – 03/23/07	\$55,231.76	10.25%	\$15.51	\$108.57
03/24/07 – 03/30/07	\$55,449.24	10.25%	\$15.57	\$108.99
03/31/07 – 04/06/07	\$55,666.72	10.25%	\$15.63	\$109.41
04/07/07 – 04/13/07	\$55,884.20	10.25%	\$15.69	\$109.83
04/14/07 – 04/20/07	\$56,101.68	10.25%	\$15.75	\$110.25
04/21/07 – 04/27/07	\$56,319.16	10.25%	\$15.82	\$110.74
04/28/07 – 05/04/07	\$56,536.64	10.25%	\$15.88	\$111.16
05/05/07 – 05/11/07	\$56,754.12	10.25%	\$15.94	\$111.58

DANNY C. MUTZIGER, II**DOCKET NO. 1,018,165**

05/12/07 – 05/18/07	\$56,971.60	10.25%	\$16.00	\$112.00
05/19/07 – 05/25/07	\$57,189.08	10.25%	\$16.06	\$112.42
05/26/07 – 06/01/07	\$57,406.56	10.25%	\$16.12	\$112.84
06/02/07 – 06/08/07	\$57,624.04	10.25%	\$16.18	\$113.26
06/09/07 – 06/15/07	\$57,841.52	10.25%	\$16.24	\$113.68
06/16/07 – 06/22/07	\$58,059.00	10.25%	\$16.30	\$114.10
06/23/07 – 06/29/07	\$58,276.48	10.25%	\$16.37	\$114.59
06/30/07 – 07/06/07	\$58,493.96	10.25%	\$16.43	\$115.01
07/07/07 – 07/13/07	\$58,711.44	10.25%	\$16.49	\$115.43
07/14/07 – 07/20/07	\$58,928.92	10.25%	\$16.55	\$115.85
07/21/07 – 07/27/07	\$59,146.40	10.25%	\$16.61	\$116.27
07/28/07 – 08/03/07	\$59,363.88	10.25%	\$16.67	\$116.69
08/04/07 – 08/10/07	\$59,581.36	10.25%	\$16.73	\$117.11
08/11/07 – 08/17/07	\$59,798.84	10.25%	\$16.79	\$117.53
08/18/07 – 08/24/07	\$60,016.32	10.25%	\$16.85	\$117.95
08/25/07 – 08/31/07	\$60,233.80	10.25%	\$16.92	\$118.44
09/01/07 – 09/07/07	\$60,451.28	10.25%	\$16.98	\$118.86
09/08/07 – 09/14/07	\$60,668.76	10.25%	\$17.04	\$119.28
09/15/07 – 09/21/07	\$60,886.24	10.25%	\$17.10	\$119.70
09/22/07 – 09/28/07	\$61,103.72	10.25%	\$17.16	\$120.12
09/29/07 – 10/05/07	\$61,321.20	10.25%	\$17.22	\$120.54
10/06/07 – 10/12/07	\$61,538.68	10.25%	\$17.28	\$120.96
10/13/07 – 10/19/07	\$61,756.16	10.25%	\$17.34	\$121.38
10/20/07 – 10/26/07	\$61,973.64	10.25%	\$17.40	\$121.80
10/27/07 – 11/02/07	\$62,191.12	10.25%	\$17.46	\$122.22
11/03/07 – 11/09/07	\$62,408.60	10.25%	\$17.53	\$122.71
11/10/07 – 11/16/07	\$62,626.08	10.25%	\$17.59	\$123.13
11/17/07 – 11/23/07	\$62,843.56	10.25%	\$17.65	\$123.55
11/24/07 – 11/30/07	\$63,061.04	10.25%	\$17.71	\$123.97
12/01/07 – 12/07/07	\$63,278.52	10.25%	\$17.77	\$124.39
12/08/07 – 12/14/07	\$63,496.00	10.25%	\$17.83	\$124.81
12/15/07 – 12/21/07	\$63,713.48	10.25%	\$17.89	\$125.23
12/22/07 – 12/28/07	\$63,930.96	10.25%	\$17.95	\$125.65
12/29/07 – 01/04/08	\$64,148.44	10.25%	\$18.01	\$126.07
01/05/08 – 01/11/08	\$64,365.92	10.25%	\$18.08	\$126.56
01/12/08 – 01/18/08	\$64,583.40	10.25%	\$18.14	\$126.98
01/19/08 – 01/25/08	\$64,800.88	10.25%	\$18.20	\$127.40
01/26/08 – 02/01/08	\$65,018.36	10.25%	\$18.26	\$127.82
02/02/08 – 02/08/08	\$65,235.84	10.25%	\$18.32	\$128.24
02/09/08 – 02/15/08	\$65,453.32	10.25%	\$18.38	\$128.66
02/16/08 – 02/22/08	\$65,670.80	10.25%	\$18.44	\$129.08
02/23/08 – 02/29/08	\$65,888.28	10.25%	\$18.50	\$129.50

DANNY C. MUTZIGER, II**DOCKET NO. 1,018,165**

03/01/08 – 03/07/08	\$66,105.76	10.25%	\$18.56	\$129.92
03/08/08 – 03/14/08	\$66,323.24	10.25%	\$18.63	\$130.41
03/15/08 – 03/21/08	\$66,540.72	10.25%	\$18.69	\$130.83
03/22/08 – 03/28/08	\$66,758.20	10.25%	\$18.75	\$131.25
03/29/08 – 04/04/08	\$66,975.68	10.25%	\$18.81	\$131.67
04/05/08 – 04/11/08	\$67,193.16	10.25%	\$18.87	\$132.09
04/12/08 – 04/18/08	\$67,410.64	10.25%	\$18.93	\$132.51
04/19/08 – 04/25/08	\$67,628.12	10.25%	\$18.99	\$132.93
04/26/08 – 05/02/08	\$67,845.60	10.25%	\$19.05	\$133.35
05/03/08 – 05/09/08	\$68,063.08	10.25%	\$19.11	\$133.77
05/10/08 – 05/16/08	\$68,280.56	10.25%	\$19.17	\$134.19
05/17/08 – 05/23/08	\$68,498.04	10.25%	\$19.24	\$134.68
05/24/08 – 05/30/08	\$68,715.52	10.25%	\$19.30	\$135.10
05/31/08 – 06/06/08	\$68,933.00	10.25%	\$19.36	\$135.52
06/07/08 – 06/13/08	\$69,150.48	10.25%	\$19.42	\$135.94
06/14/08 – 06/20/08	\$69,367.96	10.25%	\$19.48	\$136.36
06/21/08 – 06/27/08	\$69,585.44	10.25%	\$19.54	\$136.78
06/28/08 – 06/30/08	\$69,802.92	10.25%	\$19.60	\$58.80
07/01/08 – 07/04/08	\$69,802.92	6.25%	\$11.95	\$47.80
07/05/08 – 07/11/08	\$70,020.40	6.25%	\$11.99	\$83.93
07/12/08 – 07/18/08	\$70,237.88	6.25%	\$12.03	\$84.21
07/19/08 – 07/25/08	\$70,455.36	6.25%	\$12.06	\$84.42
07/26/08 – 08/01/08	\$70,672.84	6.25%	\$12.10	\$84.70
08/02/08 – 08/08/08	\$70,890.32	6.25%	\$12.14	\$84.98
08/09/08 – 08/15/08	\$71,107.80	6.25%	\$12.18	\$85.26
08/16/08 – 08/22/08	\$71,325.28	6.25%	\$12.21	\$85.47
08/23/08 – 08/29/08	\$71,542.76	6.25%	\$12.25	\$85.75
08/30/08 – 09/05/08	\$71,760.24	6.25%	\$12.29	\$86.03
09/06/08 – 09/12/08	\$71,977.72	6.25%	\$12.33	\$86.31
09/13/08 – 09/19/08	\$72,195.20	6.25%	\$12.36	\$86.52
09/20/08 – 09/26/08	\$72,412.68	6.25%	\$12.40	<u>+\$86.80</u>
				\$18,480.43

Based upon the above, under K.S.A. 44-512b the Board finds respondent is obligated to pay Betty Cantrell as the guardian of D. B. interest in the amount of \$18,480.43 for the period through September 26, 2008. Interest shall continue to accrue until respondent pays the underlying benefits.

- 5. Did the Judge err by issuing an award while respondent was attempting to obtain Mr. Laskowski's signature on a proposed order extending respondent's terminal date although respondent neither contacted Ms. Mutziger's attorney nor the Judge about such an extension?**

At the regular hearing, the Judge gave both Brandy Mutziger and Betty Cantrell until March 7, 2008, to submit their evidence in this claim. The Judge gave respondent until April 7, 2008, to complete and submit its evidence. The Judge issued the Award on April 21, 2008. Consequently, the Judge did not consider the evidence respondent had gathered by depositions taken after its terminal date.

Respondent contends the Judge entered the April 21, 2008, Award while it was waiting for Mr. Laskowski to sign an order that extended its terminal date by agreement of the parties. Mr. Laskowski, however, has made it clear he did not intend to sign the order. But more importantly, Mr. Mason was never contacted regarding respondent's desire to extend its terminal date.

The Workers Compensation Act provides that terminal dates may be extended when all of the parties agree or under one of the following three circumstances: (1) when the worker is receiving temporary or permanent total compensation; (2) for a medical examination when the examination could not be scheduled before the parties' terminal date and only if the appointment was made and notice of the appointment sent before the worker's submission of the case; and (3) on application for good cause shown.¹⁸

Here, the parties did not agree to extend respondent's terminal date. And respondent failed to request the Judge to extend its terminal date until after the Award was issued. Moreover, the evidence that respondent has proffered generally relates to D. B.'s paternity.

The Board concludes respondent's requests to set aside the Award and to remand the claim to the Judge to consider its evidence should be denied. In short, respondent permitted its terminal date to expire and the Judge to issue an award before requesting the Judge to extend its terminal date.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁹ Accordingly, the findings

¹⁸ See K.S.A. 44-523.

¹⁹ K.S.A. 2007 Supp. 44-555c(k).

and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the April 21, 2008, Award entered by Judge Fuller.

The Board awards the benefits provided in K.S.A. 2003 Supp. 44-510b to D. B. as the decedent's wholly dependent child. The award is entered against Homier Distributing Company and its insurance carrier, as follows:

Benefits are awarded for an accidental injury and resulting death that occurred on February 7, 2004, and are based on an average weekly wage of \$652.39, for compensation at the rate of \$434.95 per week.²⁰

Subject to the provisions below and K.S.A. 2003 Supp. 44-510b, the weekly compensation payments shall be paid to Betty Cantrell on behalf of D. B., a minor dependent, until he reaches 18 years of age. After that date, the minor dependent will continue to receive payment until he reaches 23 years of age only if he is enrolled as a full-time student in an accredited institution of higher education or vocational education, or if he is physically or mentally unable to earn wages in any type of substantial or gainful employment, subject, of course, to the maximum amount of compensation payable, whereupon all rights to benefits terminate.

There is due and owing to Betty Cantrell on behalf of D. B. \$40,000, plus, for the period from February 7, 2004, through September 26, 2008, there is due and owing to Betty Cantrell on behalf of D. B. 242 weeks at the rate of \$434.95 per week in the sum of \$105,257.90 for a total amount due and owing of \$145,257.90, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, payments will continue at the rate of \$434.95 per week subject to the provisions of K.S.A. 2003 Supp. 44-510b, or until further order of the Director.

The maximum amount of compensation payable to D. B. or his guardian shall not exceed \$250,000 and when such total amount has been paid the liability for any further compensation under K.S.A. 2003 Supp. 44-510b to D. B. shall cease, unless D. B. is a minor whereas compensation shall continue for the period of the child's minority at the

²⁰ The compensation rate is based on the \$652.39 average weekly wage that the parties stipulated to at the regular hearing.

weekly rate in effect and such compensation shall not be terminated until he reaches 18 years of age, unless the Workers Compensation Act should otherwise provide.

The marriage or death of D. B. shall terminate all compensation as provided by K.S.A. 2003 Supp. 44-510b.

As stipulated by the parties, burial expenses are ordered paid up to the maximum sum of \$5,000.

The benefits, rights and liability of the parties are governed by K.S.A. 2003 Supp. 44-510b.

Interest in the amount of \$18,480.43 is assessed against respondent and its insurance carrier through September 26, 2008, to be paid to Betty Cantrell as guardian of D. B. Interest shall continue to accrue until such time as respondent and its insurance carrier pay and satisfy the underlying benefits.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of September, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeffery A. Mason, Attorney for Brandy Mutziger
Ronald J. Laskowski, Attorney for Betty Cantrell as guardian for D. B.
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge